Schering-Plough

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September 13, 2002

Dockets Management Branch (HFA-305)
Food and Drug Administration
5630 Fishers Lane, Room 1061
Rockville, MD 20852

Re: Docket No. 02N-0209; Request for Comment on First Amendment Issues

Dear Sir/Madam:

Schering-Plough, as a manufacturer and marketer of prescription products, is pleased to reply to the request for public comment concerning First Amendment issues surrounding FDA's regulation of commercial speech. This response is intended to review FDA's current regulation of speech in light of most recent Supreme Court guidance.

I. Supreme Court Guidance: *Thompson v. Western States Medical Center,* 122 S.Ct. 1497 (2002) and *Central Hudson Gas & Electric Corp. v. Public Service Commission of N.Y.,* 447 U.S. 557 (1980)

Although the *Western States* case did not break new ground on the subject of government regulation of commercial speech, it is perhaps of seminal importance to FDA as it definitively establishes that FDA regulation of commercial speech should be evaluated by applying the constitutional test set forth in *Central Hudson.* In *Western States*, the Supreme Court held that the Food and Drug Administration Modernization Act (FDAMA) prohibitions on soliciting prescriptions for, and advertising, compounded drugs amount to unconstitutional restrictions on commercial speech.

Central Hudson held that for regulations restricting truthful commercial speech concerning lawful activities to be constitutionally permissible, the asserted governmental interest to be served by the regulation must be substantial, and the regulation must directly advance the governmental interest and not be more extensive than is necessary to serve that interest.

In *Western States,* the Court concluded that the government's stated interests underlying the speech restrictions, while substantial, could have been achieved through other means than by restricting speech. Therefore, according to the Court, the Government failed to demonstrate that the speech restrictions were not more extensive than is necessary to serve those interests.

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Even though the Court's decision only dealt with the specific issue of restrictions on the speech of compounding pharmacies, the principles of the decision are applicable to all of FDA's regulation of speech.

II. Principles of Speech Regulation

The *Western States* decision re-affirmed that the Court is very reluctant to allow government regulation of commercial speech, so long as that speech is truthful and not misleading. Furthermore, it also appears clear that the Court is not willing to accept restriction of speech as one of several ways to achieve the governmental interest, if the other ways of achieving that interest might be sufficient. For instance, in *Western States*, the Court cited several of the restrictions other than the speech restriction that might have, alone or in combination, served the substantial governmental interests of (1) preserving the effectiveness and integrity of the FDCA's new drug approval process and (2) drawing a line between legitimate compounding and manufacturing.

Perhaps most important, the Court emphasized that "We have previously rejected the notion that the Government has an interest in preventing the dissemination of truthful commercial information in order to prevent members of the public from making bad decisions with the information." This principle has broad implications for FDA's use of speech regulation to fulfill its mission of ensuring drug products are safe and effective.

A. Truthfulness

There is no question that the Government has an interest in regulating untruthful or misleading commercial speech, and such speech does not enjoy constitutional protection. Neither *Central Hudson* nor *Western States* touched upon the issue of determining the truthfulness of speech. However, the question of the acceptable standard of truth may be essential in FDA's evaluation of how it will regulate speech in a constitutionally acceptable manner. The FDA's standard of proof for marketing approval has not been called into question; however, is it justifiable for FDA to hold commercial speech about drug products to the same standard to which it holds product approval?

The FDA standard for approval of prescription drug products is a standard of <u>proof</u> of safety and effectiveness, which is entirely appropriate for a governmental agency charged with ensuring that marketed drug products are safe and effective. Currently, FDA holds manufacturers of prescription products to a standard that requires any communication by those manufacturers about their products, even scientific and medical information, to be consistent with those products' FDA-approved labeling. Drug marketers are not allowed, except under certain limited circumstances, to engage in speech concerning indications for which prescription drug products are not labeled. 21 CFR 202(e)(4) stipulates that "an advertisement for a prescription drug covered by a new-drug application...shall not recommend or suggest any use that is not in the labeling accepted in such new-drug application." For all practical purposes, this standard is equivalent to the standard for drug approval.

This standard is much different than the FTC standard for advertising substantiation. As stated in the FTC Policy Statement Regarding Advertising Substantiation, FTC requires that "advertisers...have a reasonable basis for advertising claims before they are made." Importantly, the FTC standard is focused upon the state of mind of the speaker; that is, it is the state of mind of the speaker that is measured against a standard of reasonableness to determine whether a product claim is truthful. In addition, FTC's advertising standard is intended, for the most part, to address advertising to the public at large, rather than to audiences that may have a special expertise in the product or industry being discussed.

The current standard for advertising, promoting, or engaging in medical or scientific discussion about prescription medications, as enforced by FDA, is much higher than the standard for advertising over-the-counter medications or any other product, as enforced by FTC. One key distinction between FTC's standard and FDA's standard is that FTC's standard is based on the truth of the communication, while FDA's standard is based on the labeling approved by FDA. The practical effect of this difference is that while FTC bases its judgment of truth upon a standard of reasonableness, FDA bases its judgment of appropriate messages on a standard of the labeling it has approved. However, it goes without saying that even the currently approved package insert does not reveal everything that may be true about a drug product. This approach to regulation of speech has been rejected by the Federal District Court for the District of Columbia in *Washington Legal Foundation v. Henney*, 56 F.Supp. 2d. 81. There, the district court stated that "The First Amendment is premised upon the idea that people do not need the government's permission to engage in truthful speech about lawful activity."

The difficulty faced by FDA in re-evaluating its regulation of commercial speech is daunting, since there could be a significant amount of information concerning prescription drugs that could be reasonably considered "true" that is not addressed in approved labeling. Thus, the rules FDA would put in place to meet its obligation to act in a constitutionally sound manner will have to fit every situation that FDA might encounter in its current function of limiting some truthful speech. In addition, every action that FDA takes to regulate a truthful statement concerning prescription drug products is, of itself, a restriction of commercial speech. That is, in order for FDA's speech restrictions to be constitutionally sound, FDA must have a justification that meets the *Central Hudson* test for every distinct action it takes to limit commercial speech.

Although the FTC standard may not be ideal regulation of commercial speech by drug manufacturers about their prescription products, the standard has characteristics that could be helpful to analyze an alternative to the current FDA oversight. Specifically, instead of being focused on the approved labeling, FDA's restriction of commercial speech must be focused on the truth of the messages being disseminated in order to be constitutionally sound.

B. Interests of the Government

The *Western States* decision acknowledges that "preserving the effectiveness and integrity of the FDCA's new drug approval process is clearly an important governmental interest." However, it is questionable whether the regulation of truthful speech concerning those approved products is essential to that mission. Just as the Court concluded that the First Amendment did not support using speech restriction as one among many methods to achieve the Government's asserted goals in *Western States*, so, too, might the Court conclude that the First Amendment does not support speech restrictions as one of many methods to achieve FDA's overall mission.

It is acknowledged that FDA has substantial interests in maintaining the integrity of its drug approval process, and ensuring that approved products are safe and effective, among other things. However, it is questionable whether FDA's speech restrictions are necessary to serve those interests.

As for FDA's interests in maintaining the integrity of its approval process, FDA might require affirmative disclosures of the lack of FDA approval of off-label messages. This would assure that FDA approval of drug products is a prominent consideration in any discussion about those products, without restricting speech in any way. As for ensuring products are safe and effective, the approval process itself ensures that drug products introduced into commerce are safe and effective for their labeled uses. And physicians, through the doctor-patient relationship, are in the best position to determine when their individual patients may benefit from an off-label use of a prescription product. These issues are discussed further below.

Indeed, FDA has long recognized and acknowledged its interest in ensuring that physicians have the most updated information on prescription products, including medical and scientific information on off-label uses. Pharmaceutical manufacturers are, perhaps, the richest source of all information on their products, both on-label and off-label. The input of pharmaceutical companies in this important discussion of medical and scientific information is vital to the practice of medicine.

III. Audience

The Supreme Court's has emphatically re-affirmed the principals that commercial speakers should be allowed to communicate truthful information to the public, and that fear of misuse of that truthful information by the public is not a sufficient justification to limit such speech. Therefore, it is difficult to find constitutional justification for restricting such speech by pharmaceutical manufacturers, or for distinguishing the commercial speech that may be appropriate for physicians, other expert audiences, or the general public.

The pharmaceutical industry has a wide range of audiences to its messages. Each of the audiences has a level of sophistication and a focus of interest that a pharmaceutical company should be able to address with as little governmental restriction as possible. As

to physicians, other prescribers and managed care organizations, for instance, there is an ability to understand and assimilate even highly technical information. In most cases, this can be simply directing physicians to appropriate information sources. Even if fear of confusion or misuse of truthful information were a legitimate basis upon which to restrict speech, these groups are much less susceptible to these dangers than the general public. It is essential for these groups to know, or have ready access to, all relevant information concerning drug products, regardless of whether that information is included in the FDA approved package insert.

As to consumers, the *Western States* decision specifically points to the fact that compounded products require prescriptions from physicians in order for consumers to have access to compounded products as a reason that speech restrictions are unnecessary. The Court states that:

> "Although the advertising ban may reduce the demand for compounded drugs from those who do not need the drugs, it does nothing to prevent such individuals from obtaining compounded products other than requiring prescriptions. But if it is appropriate for the statute to rely on doctors to refrain from prescribing compounded drugs to patients who do not need them, it is not clear why it would not also be appropriate to rely on doctors to refrain from prescribing compounded drugs to patients who do not need them in a world where advertising was permitted."

This concept is equally applicable to manufactured prescription products, and perhaps more so since there is usually very little safety or efficacy data of any kind to support the use of a compounded product, while there is usually extensive data, both on label and off label, to support the use of manufactured prescription products.

IV. Suggested Approach to Regulation

It is suggested here that the FDA change its view of its function to protect the public health by restricting commercial speech. It is essential that oversight of messages concerning prescription medications be based upon the truth and clarity of the communication, rather than upon approved labeling. Toward that end, FDA should judge the truthfulness of commercial speech about prescription medications on the reasonable conclusions that may be drawn from research used to substantiate the message or premise communicated, with a focus on the scientific validity of the research conducted. In order to provide guidance to industry, FDA should focus on establishing parameters that will serve as the standard of scientific validity that FDA would demand when reviewing information disseminated by manufacturers. Thus, FDA would allow truthful communications by pharmaceutical manufacturers that are based upon reasonable conclusions drawn from scientifically valid research.

This scenario would place FDA in a position to require pharmaceutical manufacturers to substantiate their claims once they are made, and to potentially bring actions against pharmaceutical companies that make advertising, medical or scientific statements about

products that cannot be substantiated. Certain guidelines could be established on "how to" best implement this change in regulatory approach, but blanket restrictions are not appropriate.

In order to ensure that the approval process does not become superfluous and that the public is informed as to the indications for medications that have received FDA approval, FDA could require disclosures, rather than restrict communications. Part of the logic behind limiting information communications direct-to-consumers to approved labeling is that once a product has been approved for marketing, there is no control of how physicians might prescribe the product. The term "safe and effective" is a relative term that necessitates an analysis in the context of particular disease states that a product may be prescribed to treat. However, FDA could still accomplish its mission to protect the public health by requiring drug manufacturers to disclose to their audiences when indications being discussed have not been approved by FDA for the medication. In fact, the Supreme Court seemed to approve such an approach for compounded drugs in *Western States* when it stated, "Even if the Government did argue that it had an interest in preventing misleading advertisements, this interest could be satisfied by the far less restrictive alternative of requiring each compounded drug to be labeled with a warning that the drug had not undergone FDA testing and that its risks were unknown." Disclosure by would give physicians and other health care providers sufficient information to make sound decisions and ensure the effectiveness and integrity of the new drug approval process, yet not be subject to First Amendment attack.

As to the standards that FDA should use to judge scientific validity, it is suggested here that FDA look to the disciplines best suited to evaluate the information being disseminated, and adopt the standards accepted within that discipline for scientific validity.

For example, managed care organizations (MCOs) have the responsibility for both providing medical care and for assuming – or capitating – the actuarial risk of loss. MCOs, therefore, deal with issues encompassing clinical, economic, pharmacoeconomic, quality of life and safety information related to and surrounding the use of medications. Pharmaceutical manufacturers have an interest in discussing these matters with MCOs, but are currently limited from doing so due to FDA restrictions. In evaluating the truth of information that drug manufacturers disseminate in this regard, FDA could use standards accepted in the managed care industry, including scientific, statistical and actuarial expertise, to judge the validity of whatever support the manufacturer presents to substantiate such medical, scientific or pharmacoeconomic information.

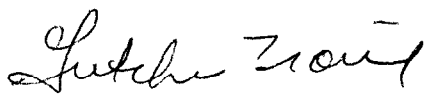
Similarly, with respect to communications to physicians, there exists a standard of "peer review" which medical journals use to evaluate the scientific validity of research that they publish. FDA's review of safety and efficacy information presented to support medical and scientific information discussed by drug manufacturers could use such peer review as its standard of scientific validity. Indeed, FDA might decide that statements that are based upon a reasonable conclusion drawn from peer-reviewed research is presumptively not false or misleading.

V. Conclusion

Schering-Plough believes that pharmaceutical manufacturers should be allowed to communicate truthful, non-misleading information about prescription medications to all audiences. FDA should revise its vital oversight of the healthcare industry to ensuring that messages communicated are truthful and not misleading. This evaluation should be based upon the truthfulness of the communication itself, rather that adherence to the approved labeling of the products.

Schering-Plough thanks you for the opportunity to present its point of view.

Sincerely,



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